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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 492

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,
Petitioner,

vs.

NATIONAL DISTILLERS PRODUCTS CORPORATION, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal, State of California,
First Appellate District, Division Two.

DION R. HOLM,
City Attorney of the City and County of San Francisco,
LAWRENCE S. MANA,
Chief Deputy City Attorney of the City and County of San Francisco,
206 City Hall, San Francisco 2, California,
Attorneys for Petitioner.

PERKAU-WALSH PRINTING CO., SAN FRANCISCO

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PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal, State of California, First Appellate District, Division Two.

The City and County of San Francisco, petitioner herein, prays respectfully that this Court issue a writ of certiorari to review the decision and judgment of the District Court of Appeal, State of California, First Appellate District, Division Two, entered in the above entitled case on May 21, 1956.

JURISDICTION.

The judgment of the District Court of Appeal, State of California, First Appellate District, Division Two, was filed and entered on May 21, 1956. A petition for hearing in the Supreme Court of the State of California was timely filed on June 29, 1956, which petition for hearing in the Supreme Court of the State of California was denied by order dated July 18, 1956. (Appendix C, hereto *infra* p. xix).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

OPINION BELOW.

The opinion of the District Court of Appeal, State of California, First Appellate District, Division Two, appears in Appendix B, hereto *infra* pp. vi-xviii, and is reported in 141 Advance California Appellate Reports 719.

QUESTIONS PRESENTED.

The District Court of Appeal, State of California, First Appellate District, Division Two, has construed Sections 311, 309(a) and (b) and 313(d) of the Tariff Act of 1930, as amended (19 U.S.C. §§ 1311, 1309(a) and (b) and 1313(d), respectively), granting an exemption from internal revenue tax to articles manufactured of materials subject to internal revenue tax and eventually intended for exportation or for use as

ships' stores, to be an exercise of the Congressional power over foreign commerce under Article I, Section 8, Clause 3 of the United States Constitution, and has declared personal property taxes of the State of California levied pursuant to Section 201 of the Revenue and Taxation Code of the State of California on said articles to be an interference with the federal regulation of foreign commerce and has ordered a refund of said taxes. It has been the contention of petitioner that the grant of exemption by the sections of the Tariff Act of 1930, as amended, set forth above from internal revenue taxes was an exercise of the taxing power of Congress and not the power over foreign commerce, and that therefore the personal property taxes of the State of California were validly levied.

The questions presented are:

1. Whether the grant of exemption from internal revenue tax of articles manufactured from materials subject to internal revenue tax when intended for exportation or for use as ships' stores by Section 311, 309(a) and (b) and 313(d) of the Tariff Act of 1930, as amended, is an exercise of the Congressional power over foreign commerce pursuant to Article I, Section 8, Clause 3 of the United States Constitution or an exercise of the taxing power of Congress pursuant to Article I, Section 8, Clause 1 of the United States Constitution.

2. Whether the grant of an exemption from internal revenue tax by Congress of articles manufactured of materials subject to internal revenue tax and intended for exportation or for use as ships' stores

precludes the exercise by a State of its taxing power over such articles from the moment of the commencement of production of said articles and before such articles become exports or enter the export stream.

STATUTES.

The statutory provisions involved are Sections 311, 309(a) and (b) and 313(d) of the Tariff Act of 1930, as amended (19 U.S.C. §§ 1311, 1309(a) and (b) and 1313(d)), and also Section 201 of the Revenue and Taxation Code of the State of California. These statutes are printed in Appendix A, *infra*.

STATEMENT OF THE CASE.

The Assessor of the City and County of San Francisco levied a nondiscriminatory ad valorem personal property tax pursuant to Section 201 of the Revenue and Taxation Code of the State of California on certain types of liquor owned by respondent, which liquor was situated in the City and County of San Francisco on the tax day of the year 1952, to wit, the first Monday of March. Some of this liquor had been in California since 1947. None of the liquor was at the time the taxes were levied sold or consigned, but was held by respondent to fill orders which might in the future be received. This liquor fell into three classes.

1. Liquor Manufactured in Class 6, United States Customs Bonded Warehouse, and Bottled.

Of the liquor taxed by the Assessor on tax day, 2,076 cases consisted of liquor manufactured in a United States Customs Bonded Warehouse, Class 6, at Baltimore, Maryland, as allowed by federal statute (19 U.S.C. 1311), and then transported to the City and County of San Francisco where it was stored in a Class 3 Customs Bonded Warehouse on tax day. This liquor was 86 or 86.8 proof and was not bottled for domestic use. After the manufacture and bottling of said liquor in the Class 6 warehouse at Baltimore, the liquor was transported to San Francisco upon a bonded common carrier and upon its arrival at San Francisco was stored in a Class 3 customs warehouse under a customs bond conditioned upon exportation. A substantial amount of the liquor in question was still in the warehouse at the time of trial of the said action. Some of the liquor was sold to a local ship chandlery firm, which firm thereafter at various dates sold the said liquor in lots of one or two cases to various ships to be used as ships' stores; some for ships operating between the United States and the Hawaiian Islands, some for ships in the intercoastal trade, and one case was sold to a fishing vessel operating in the local waters in and about the City and County of San Francisco.

2. Liquor Bottled in Internal Revenue Bond.

Of the liquor taxed by the Assessor on tax day 1952, 1,208 cases were manufactured in an Internal Revenue distillery and transferred to and bottled in Baltimore,

Maryland. It was 86 proof and the labels on the bottles were marked "Bottled in Bond for Export" and the cases were marked "For Export from United States of America." The liquor was moved to San Francisco by bonded carrier and it was covered by bonds conditioned upon exportation or use for ships' stores.

3. 5,281 Cases on Which Internal Revenue Taxes Had Been Paid Subject to Drawback.

Of the liquor taxed by the Assessor on tax day 1952, 5,281 cases consisted of liquor upon which internal revenue taxes had been paid but upon which the taxes would be refunded to the respondent upon proof of export or of use for ships' stores consisting of a duly executed landing certificate at a foreign port. This liquor was covered by a bond conditioned upon the exportation of said liquor or the use of said liquor on vessels or aircraft as supplies. These bottles were labeled "For Export" and the cases carried the stamp "Bottled for Export U.S.A." The liquor was moved to San Francisco by common carrier and was held at South End Warehouse in San Francisco on tax day. Some of the drawback liquor was taken into the warehouse on June 28, 1948; part of this lot was exported on May 25, 1953, approximately five years later, indicating that that particular liquor had been in the warehouse for approximately five years; the balance thereof was still in the warehouse on September 1, 1953, indicating that that particular liquor was in the warehouse in the State of California more than five years. Some of the liquor was taken into the warehouse as

early as June 17, 1947 and was not taken out of the warehouse until July 21, 1952, more than five years later.

The trial Court concluded that the instant situation was governed by the United States Supreme Court case of *McGoldrick v. Gulf Oil Corp.* (1939), 309 U.S. 414, and in its conclusions of law stated that the liquor in question "constituted items in foreign commerce over which the federal government has exercised its power of regulation and control to the end that such distilled spirits may be sold or otherwise disposed of for transportation to destinations in foreign countries or sold for use as supplies for specified vessels of the United States free of the burden of domestic taxation." The trial Court ordered the taxes refunded.

Petitioner appealed to the District Court of Appeal, State of California, which Court affirmed the judgment of the trial Court and again concluded that the instant situation was governed by the United States Supreme Court case of *McGoldrick v. Gulf Oil Corp.*, supra.

REASONS FOR ALLOWANCE OF THE WRIT.

The District Court of Appeal, State of California, First Appellate District, has decided an important question of federal law which has not been, but should be, settled by this Court, in that said Court has ruled that the grant of an exemption from internal revenue taxes upon an article manufactured of materials sub-

ject to internal revenue taxes levied solely under the taxing power of the United States Constitution is an exercise not of the taxing power of Congress but of the distinct power to regulate foreign commerce under the United States Constitution (Article I, Section 8, Clause 3), and in so deciding has removed from the taxing power of the State merchandise of domestic origin and manufacture which is not in commerce at the time the taxing power of the State is attempted to be exercised by the State.

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1. **THE GRANT OF AN EXEMPTION FROM INTERNAL REVENUE TAX TO LIQUOR TO BE EXPORTED OR USED AS SHIPS' STORES IS AN EXERCISE OF THE TAXING POWER AND NOT OF THE POWER OVER FOREIGN COMMERCE.**

(A) Levy of Internal Revenue Taxes Is Solely an Exercise of the Taxing Power.

That the levying of internal revenue taxes is an exercise solely and exclusively of the taxing power of Congress cannot be questioned.

See:

License Tax Cases, 5 Wall. 462;
Plumley v. Massachusetts, 155 U. S. 461;
South Carolina v. United States, 199 U. S. 437;
Ohio v. Helvering, 292 U. S. 368.

Similar internal revenue taxes on other products have been held to be levied under the taxing power of the Federal Government.

Felsenheld v. United States (tobacco), 186 U. S. 126;
In re Kollock (oleomargarine), 165 U. S. 526;

United States v. Doremus (drugs), 249 U. S. 86;

Sonzinsky v. United States (firearms), 300 U. S. 506.

(B) The Grant of an Exemption From Internal Revenue Taxes Levied Under the Taxing Power Must Likewise Be Held to Be an Exercise of the Taxing Power and of No Other Federal Power.

The District Court of Appeal, State of California, First Appellate District, Division Two, in the instant case, arrived at the anomalous conclusion that the grant of an exemption from internal revenue taxes admittedly levied under the taxing power of Congress was an exercise not of the taxing power of Congress but of the power over foreign commerce.

Congress has in the past on occasion taxed some articles and exempted others from taxation, which acts of Congress have always been construed to be an exercise of its taxing power.

See:

Western Electric Power Co. v. United States, 336 U. S. 176 (involving a statute taxing electricity sold for domestic or commercial consumption but not taxing electricity sold for industrial consumption);

In re Kollock, 165 U. S. 526 (sustaining the validity of a statute levying a tax of two cents on yellow oleomargarine but leaving uncolored oleomargarine exempt from tax).

The Court was led to this erroneous conclusion by two reasons:

1. That the exemption had been granted by a tariff act, to wit, the Tariff Act of 1930, as amended;
2. That the instant case was similar to the holding of this Court in the case of *McGoldrick v. Gulf Oil Corp.,* 309 U. S. 414.

Neither of these reasons is valid.

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2. THE TARIFF ACT OF 1930 IS BOTH AN EXERCISE OF THE TAXING POWER AND THE POWER OVER FOREIGN COMMERCE, AND THE GRANT OF THE EXEMPTION FROM INTERNAL REVENUE TAXES THEREIN IS AN EXERCISE OF THE TAXING POWER.

The Tariff Act of 1930 is entitled "An Act to Provide Revenue, to Regulate Commerce with Foreign Countries, to Encourage Industries of the United States, to Protect American Labor, and for Other Purposes." It will be noted that the first purpose stated in the title quoted above is "to provide revenue" and that the second purpose is "to regulate commerce with foreign countries."

In *McGoldrick v. Gulf Oil Corp.,* supra, at page 428, it was stated:

> "The laying of a duty on imports, although an exercise of the taxing power, is also an exercise of the power to regulate foreign commerce."

There can be no question, therefore, that the Tariff Act of 1930 was an exercise of both the taxing power of Congress and the power over foreign commerce.

The United States Supreme Court has at various times, depending upon the necessity of sustaining action of Congress under the Tariff Acts, stated that a specific act was an exercise of either the power to tax or the power to regulate foreign commerce, whichever would sustain the validity of the Congressional action in question. Thus, in the case of *University of Illinois v. United States,* 259 U. S. 48, where the issue was whether an import duty could be levied on scientific apparatus imported by an instrumentality of the State, the United States Supreme Court concluded that the import duty was levied under the power of Congress to regulate commerce and not under the taxing power, and that, therefore, the import duty was not a tax on the State. Clearly, in dealing with imports, there would be no doubt as to the validity of this conclusion.

However, in the case of *J. W. Hampton, Jr. & Company v. United States,* 276 U. S. 394, the question was presented of the constitutionality of the Tariff Act of 1922, which allowed the President, with the aid of advisers, to determine what the import duty on specific articles should be, with the express purpose of encouraging and protecting domestic manufacturers of the imported article within the United States. Even though the *Hampton* case involved an import duty in a Tariff Act, the constitutionality of that portion of the Tariff Act of 1922 was sustained as an exercise of the taxing power, and not as an exercise of the power to regulate foreign commerce. The Court there recognized that one of the purposes of the Tariff Act there

in question was to secure revenue for the benefit of the general government, and that that purpose was sufficient to sustain the act even though the motive in fixing the rates of duty was to so fix them as to encourage the industries of the United States in competition with producers in other countries. Thus where the impact of the Tariff Act was as to goods of domestic origin not in commerce, the United States Supreme Court could not sustain the validity of the Congressional action under the commerce power, but was forced to rely on the constitutional power to levy taxes. (See also *License Tax Cases,* 5 Wall. 462.)

The United States Supreme Court held the legislation valid under the taxing power notwithstanding the fact that the particular section of the Tariff Act of 1922 involved in the case of *J. W. Hampton Jr. & Co. v. United States,* supra (Section 315(a) and 315(b) of the said Tariff Act) read in part as follows:

> "That in order to regulate the foreign commerce of the United States . . ."

Thus, in spite of the express Congressional declaration that the purpose was to regulate the foreign commerce of the United States, the United States Supreme Court found it necessary in sustaining the particular provisions of the Tariff Act to rely on the constitutional power granted to Congress to levy taxes.

It should be noted that substantially the same provisions of the Tariff Act of 1922 were re-enacted in the Tariff Act of 1930, as Section 326 of the Tariff Act of

1930, the only significant change being deletion from the said section of the phrase:

> "to regulate the foreign commerce of the United States."

The inclusion in the Tariff Act of 1930 of the flexible tariff provisions of the Tariff Act of 1922, the constitutionality of which latter provisions had been sustained in the case of *J. W. Hampton Jr. & Co. v. United States* as an exercise of the taxing power of Congress, establishes beyond question that certain provisions of the Tariff Act of 1930 are an exercise of the taxing power of Congress. Thus it is established that in looking at the Tariff Act of 1930 it is necessary to examine each particular section to ascertain under what constitutional power the said section is enacted. Where, as in the case of the articles of domestic manufacture, there is no commerce involved and the matter is one of exemption from internal revenue taxes levied pursuant to the taxing power of Congress, the only conclusion that can be reached is that the granting of such exemption is an exercise of the taxing power and no other power.

Petitioner's position is that the levy by Congress of internal revenue taxes on liquor is an exercise by Congress of the taxing power, and that the granting of an exemption by Congress from the selfsame internal revenue taxes to liquor for any purpose whatsoever, even if such liquor is to be exported or to be used for ships' stores, is similarly an exercise of the federal

taxing power. This would be so even though the motive might be to encourage commerce.

It has clearly been established that a distinction must be drawn between the power of Congress to take certain actions and the motive which prompts the taking of said actions.

Thus, concededly, where the motive has been to discourage wagering and gambling and to stifle the gambling racket, such action has been sustained under the taxing power, even though the revenue collected was negligible. (*United States v. Kahriger,* 345 U.S. 22.)

Similarly, where the motive has been to prohibit commerce in marijuana, the action has been sustained under the taxing power (*United States v. Sanchez,* 340 U.S. 42), even though the United States Supreme Court conceded that the revenue purpose of the tax was secondary.

Thus, even though it were to be conceded in the instant case that the exemption from tax would have the incidental effect of encouraging economic activity in the tax-exempt liquor and make the said tax-exempt liquor better able to compete in foreign markets, the important factor would be the power pursuant to which the exemption is granted and not the motive which may have prompted the exercise of the power. The power in the instant case was the taxing power, and as the United States Supreme Court stated in the *Hampton* case, supra:

> "The fact that Congress declares that one of its motives in fixing the rates of duty is to so fix them that they shall encourage the industries of this country in competition with producers in other countries in the sales of goods . . . cannot invalidate a revenue act so framed."

The District Court apparently took the position that because the liquor was manufactured under government regulation for eventual export or use as ships' stores, the liquor was therefore at all times, from the moment its production commenced, segregated from the general mass of personal property and not subject to the taxing power of the State. Such segregation, however, was solely to prevent the diversion of the liquor to the domestic market without the payment of tax, and for no other reason. (See *Dunlap v. United States,* 173 U.S. 65.)

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3. THE CONCLUSION OF THE CALIFORNIA COURTS THAT THE INSTANT SITUATION WAS SIMILAR TO THAT IN THE GULF OIL CASE IS ERRONEOUS.

The District Court of Appeal, State of California, First Appellate District, Division Two, held that "The instant case seems to present a situation that is clearly within the rationale of the Gulf Oil case." (141 A.C.A. 719, 723.) In the *Gulf Oil* case this Court concluded that the grant of an exemption under the Tariff Act of 1930 from *import duties,* the levying

of which import duties was recognized to be an exercise of the Congressional power over foreign commerce, was likewise an exercise of the Congressional power over foreign commerce. The Supreme Court of the United States recognized that the imported merchandise was segregated from the mass of goods within the State and that though the crude oil there involved was processed and refined, it at all times retained its status as an **import** and as a consequence was immune as an import from local taxation. This Court particularly relied on the customs regulation which provided that "imported goods in bonded warehouses are exempt from taxation under the general laws of the several States".

The *Gulf Oil* case, therefore, presents the situation of an exemption from an **import** duty levied under the commerce power, the exemption also being held to be an exercise of the same commerce power.

In the instant case, as distinguished from the *Gulf Oil* case, supra, the merchandise in question was solely and exclusively of domestic origin and the internal revenue tax levied on the particular type of merchandise was levied solely and pursuant to the exercise of the federal taxing authority. If Congress levies the internal revenue tax pursuant to the taxing power and thereafter provides for specific exemptions under which articles shall be free from tax, both the levying of the tax and the exemption therefrom are an exercise of the taxing power and of no other power. Thus, for example, Congress granted the privilege to the United States of pur-

chasing supplies imported from foreign countries to the United States duty-free. By Act of Congress this privilege was extended to all articles of domestic production which were subject to a tax under the Internal Revenue Code so that the United States could purchase such articles without the payment of internal revenue tax. (See 26 U.S.C. §3331.) This was an act by Congress pursuant to the taxing power declaring the policy of tax-free purchases by the federal government. (See *United States v. Mullins* (C.C.A. 6, 1902), 119 Fed. 334; 25 U. S. Attorney General's Opinions 449.) Similarly, Congress has allowed exemptions from taxation as to alcohol used domestically for purposes other than beverage purposes. (See *Dunlap v. United States*, 173 U.S. 65.)

It is respectfully submitted that the grant of exemption from internal revenue taxes of the liquor in question was solely and exclusively an exercise of the taxing power of Congress.

CONCLUSION.

The question involved in this controversy is the construction of federal statutes by a State in such a manner as to raise the issue as to (1) whether the statutes as construed are not beyond the power of Congress under Article I, Section 8, Clause 3 of the United States Constitution, and (2) whether statutes as so construed do not unconstitutionally restrict and limit the taxing power of the State over

articles of a domestic nature which are not in foreign commerce.

Petitioner respectfully submits that for the foregoing reasons the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
October 1, 1956.

Respectfully submitted,

DION R. HOLM,
City Attorney of the City and County of San Francisco,
LAWRENCE S. MANA,
Chief Deputy City Attorney of the City and County of San Francisco,
Attorneys for Petitioner.

(Appendices A, B and C Follow.)

Appendix A

TARIFF ACT OF 1930 SECTION 311, AS AMENDED, 19 U.S.C. § 1311.

"All articles manufactured in whole or in part of imported materials, or of materials subject to internal-revenue tax, and intended for exportation without being charged with duty, and without having an internal-revenue stamp affixed thereto, shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses similar to those known and designated in Treasury Regulations as bonded warehouses, class six * * *.

"* * *

"Articles manufactured under these provisions may be withdrawn under such regulations as the Secretary of the Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the sole purpose of immediate export therefrom * * *.

"* * *

"Distilled spirits and wines which are rectified in bonded manufacturing warehouses, class six, and distilled spirits which are reduced in proof and bottled in such warehouses, shall be deemed to have been manufactured within the meaning of this section, and may be withdrawn as hereinbefore provided, and likewise for shipment in bond to Puerto Rico, subject to

the provisions of this section, and under such regulations as the Secretary of the Treasury may prescribe, there to be withdrawn for consumption or be rewarehoused and subsequently withdrawn for consumption * * * *Provided further,* That no internal-revenue tax shall be imposed on distilled spirits and wines rectified in class six warehouses if such distilled spirits and wines are exported or shipped in accordance with the provisions of this section, and that no person rectifying distilled spirits or wines in such warehouses shall be subject by reason of such rectification to the payment of special tax as a rectifier. (June 17, 1930, c. 497, title III, § 311, 46 Stat. 691; June 26, 1936, c. 830, title IV, § 404, 49 Stat. 1960.)"

TARIFF ACT OF 1930 SECTIONS 309(a) AND (b), AS AMENDED, 19 U.S.C. §§ 1309(a) AND (b).

"§ 1309. *Supplies for certain vessels and aircraft—Exemption from customs duties and internal-revenue tax.*

"(a) Articles of foreign or domestic origin may be withdrawn, under such regulations as the Secretary of the Treasury may prescribe, from any customs bonded warehouse, from continuous customs custody elsewhere than in a bonded warehouse, or from a foreign-trade zone free of duty and internal-revenue tax, or from any internal-revenue bonded warehouse, from any brewery, or from any winery premises or bonded premises for the storage of wine, free of internal-revenue tax—

"(1) for supplies (not including equipment) of (A) vessels or aircraft operated by the United States, (B) vessels of the United States employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions, or (C) aircraft registered in the United States and actually engaged in foreign trade or trade between the United States and any of its possessions; or

"(2) for supplies (including equipment) or repair of (A) vessels of war of any foreign nation, or (B) foreign vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the United States and any of its possessions, where such trade by foreign vessels is permitted; or

"(3) for supplies (including equipment), ground equipment, maintenance, or repair of aircraft registered in any foreign country and actually engaged in foreign trade or trade between the United States and any of its possessions, where trade by foreign aircraft is permitted. With respect to articles for ground equipment, the exemption hereunder shall apply only to duties and to taxes imposed upon or by reason of importation.

[DRAWBACK]

"(b) Articles withdrawn from bonded warehouses, bonded manufacturing warehouses, continuous customs custody elsewhere than in a bonded warehouse,

or from a foreign-trade zone, and articles of domestic manufacture or production, laden as supplies upon any such vessel or aircraft of the United States or laden as supplies (including equipment) upon, or used in the maintenance or repair of, any such foreign vessel or aircraft, shall be considered to be exported within the meaning of the drawback provisions of this chapter.

"* * *

"June 17, 1930, c. 497, title III, § 309, 46 Stat. 690; June 25, 1938, 5 p.m., E.S.T., c. 679, § 5(a), 52 Stat. 1080; July 22, 1941, c. 314, § 3, 55 Stat. 692; Aug. 8, 1953, c. 397, § 11(a), 67 Stat. 514."

TARIFF ACT OF 1930 SECTION 313(d), 19 U.S.C. § 1313(d).

"* * *

"Upon the exploration of bottled distilled spirits and wines manufactured or produced in the United States on which an internal-revenue tax has been paid, there shall be allowed, under regulations to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, a drawback equal in amount to the tax found to have been paid on such bottled distilled spirits and wines: *Provided,* That such distilled spirits and wines have been bottled especially for export, under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

"* * *

"(June 17, 1930, c. 497, title III, § 313, 46 Stat. 693; May 17, 1932, c. 190, 47 Stat. 158; June 26, 1936, c. 830, title IV, §§ 402, 403, 49 Stat. 1960.)"

REVENUE AND TAXATION CODE OF THE STATE OF CALIFORNIA, SECTION 201.

"*Taxable property.* All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code."

Appendix B

Filed
May 21, 1956
Walter S. Chisholm, Clerk

In the District Court of Appeal
State of California
First Appellate District

Division Two

1 Civil No. 16,538

National Distillers Products Corporation, a corporation,
Plaintiff and Respondent,
vs.
City and County of San Francisco, a municipal corporation,
Defendant and Appellant.

Opinion

This is an appeal by defendant City and County of San Francisco from a judgment of the superior court ordering it to refund certain personal property taxes paid under protest by plaintiff National Distillers Products Corporation.

Respondent is a Virginia corporation qualified and entitled to do business in the State of California. It

is engaged in business as an importer, exporter, manufacturer and distributor of wines, liquors, and other alcoholic beverages. In the course of this business it manufactures, and purchases from and sells to manufacturers, wholesalers, dealers and distributors located in various states of the United States and in various countries of the world, the merchandise required for and involved in the conduct of its business. On the first Monday of March, 1952, tax day, it owned and possessed in warehouses in San Francisco certain quantities of liquor upon which appellant levied and collected an ad valorem personal property tax. Respondent paid the portion of the tax assessed against the liquor here in question under protest, and then instituted this action to recover that tax, claiming that this liquor was exempt from state taxation.

Respondent had judgment against appellant for $9831.45 plus interest from the date that the disputed tax in this amount was paid. $4708.92 of this sum represented a tax assessment against 5281 cases of liquor which had been imported by respondent from foreign countries and held by it in San Francisco as the original importer and in the original package on the tax day. As to this liquor it is conceded that the tax was properly recovered under the authority of Parrott & Co. v. City & County of S.F., 131 Cal. App. 2d 332.

The remainder of the disputed tax in the amount of $5122.53 was assessed with respect to 9195 cases of liquor owned and possessed by respondent in warehouses in San Francisco on assessment day. This

liquor had been delivered to the San Francisco warehouses on various dates, starting with June 28, 1948. As to this liquor the trial court found: "Two thousand seven hundred six (2,706) cases of said spirits had been rectified, reduced in proof, and bottled in a United States customs bonded warehouse, Class 6, in Baltimore, Maryland; stamped, packaged, and labeled for export; immediately thereafter transported by bonded common carrier to San Francisco; and there held under United States customs bond in a Class 3 customs bonded warehouse. One thousand two hundred eight (1,208) cases of said spirits had been bottled in Baltimore, Maryland, under internal revenue bond; stamped, packaged, and labeled for export; immediately thereafter transported by bonded common carrier to San Francisco; and there held under internal revenue bond in a public warehouse. Five thousand two hundred eighty-one (5,281) cases of said spirits had been bottled, stamped, packaged, and labeled especially for export in Baltimore, Maryland; immediately thereafter transported by bonded common carrier to San Francisco; and there held in the export storage room of a public warehouse, subject to a drawback or refund of previously paid internal revenue taxes upon proof of export in accordance with appropriate federal regulations. All of said spirits were produced, bottled, packaged, labeled, stamped, and transported to California, and thence aboard ship for transportation to destinations in foreign countries or use as supplies of vessels in accordance with applicable federal laws and regulations and

under the supervision and control of appropriate federal government agencies."

As of September 1, 1953, 614 cases of this liquor were still in San Francisco warehouses. "At various times after March 3, 1952, 43 cases of said 9,195 cases of distilled spirits in United States customs bond were, while in bond, sold and placed aboard vessels, and used as supplies of vessels of the United States actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and its possessions, and two cases of spirits in United States customs bond, while in bond, were sold and placed aboard vessels, and used as supplies of vessels of the United States employed in the fisheries on the high seas; of said 45 cases of spirits aforesaid, 20 cases were sold directly to the owners of and delivered to said vessels, and 25 cases were sold to a concern in San Francisco doing business as a ship chandler—which concern thereafter sold said 25 cases for delivery to the owners and to said vessels. At various times after March 3, 1952, the remainder of said 9,195 cases of distilled spirits were sold and placed aboard vessels and transported to customers and destinations in foreign countries."

There was testimony that under the federal regulations it was not possible to sell any of this liquor domestically. Mr. Carl P. Greely, Assistant General Traffic Manager of respondent having control and supervision over all imports, exports and domestic shipments for respondent and its subsidiaries and affiliated companies, testified that he knew of no case

in which respondent had sold liquor of the type here in question domestically. He stated that the reason for this was that first it would be necessary to secure permission from the Commissioner of Internal Revenue in Washington and prove a hardship case in order to do so. Further, he testified that it would not be financially feasible to do such a thing as it would require new packaging, bottling, labeling, and would also result in the payment of an internal revenue tax on 14 percent of the contents which would be water rather than liquor because of the difference in proof between the liquor sold domestically and that designed for export.

The court found that "the production, transportation to San Francisco, detention in a public warehouse, and movement aboard vessels under bond for delivery to customers and destinations in foreign countries or consumption on the high seas constituted integrated steps in a movement of goods in interstate and foreign commerce in the process of shipment either to foreign destinations or for consumption aboard vessels on the high seas, in accordance with plaintiff's plan and intent."

The court concluded that this liquor "constituted items in foreign commerce over which the federal government has exercised its power of regulation and control to the end that such distilled spirits may be sold or otherwise disposed of for transportation to destinations in foreign countries or sold for use as supplies for specified vessels of the United States free of the burden of domestic taxation. The statutes and

regulations applicable to these spirits taken together operate as regulations of foreign commerce; and read in the light of their purpose they are tantamount to a declaration that in order to accomplish constitutionally permissible ends the merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition in the manner above specified, and shall not become subject to the state taxing power. The purposes of the Congressional regulation applicable to this phase of foreign commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred by Congress upon the said spirits or infringe on the Congressional regulation of this class of foreign commerce." Thus it further concluded that the personal property taxes were illegally and unconstitutionally assessed and collected by appellant from respondent.

At the trial respondent contended, as it does on appeal also, that the tax imposed on the liquor to be exported or sold as ships' stores was unlawful under both Article I, Section 8, Clause 3 of the United States Constitution (commerce clause) and Article I, Section 10, Clause 2 of that Constitution (import-export clause). The trial court agreed with respondent as to its first contention and therefore did not decide on the merits of its second argument.

Appellant first argues that the levy of the personal property tax here sought to be imposed was not an interference with the federal regulation of foreign

commerce. The trial court based its decision to the contrary on McGoldrick v. Gulf Oil Corp., 309 U. S. 414. In that case the City of New York sought to impose a sales tax on fuel oil manufactured in New York City from crude petroleum which had been imported from a foreign country to New York and there sold to vessels engaged in foreign commerce. Gulf Oil Corporation's predecessor imported crude petroleum and made customs entry of it for its own manufacturing warehouse pursuant to its bonds given to the United States under the warehouse laws of the United States and treasury regulations. The bonds were given for the purpose of enabling the importer, under statutes of the United States and treasury regulations, to bring the petroleum into the United States to manufacture it while in bond into fuel oil and then to withdraw it for export or other lawful purpose free of the import duty which would otherwise be payable. The bonds were conditioned upon compliance with laws and regulations relating to the custody and safekeeping of the imported merchandise and its products held in bond, and to its lawful withdrawal from the warehouse under permit of the collector of the customs. The court reviewed in detail the provisions of the Revenue Act of 1932 laying a tax on the importation of crude petroleum and granting exemptions, the related provisions of the Tariff Act of 1930, and the applicable treasury regulations, and concluded that taken together they operated as regulations of foreign commerce. It then held that the tax sought to be imposed conflicted with the Congressional policy adopted by

the Acts of Congress to relieve the importer of the import tax so that he might meet foreign competition in the sale of fuel as ships' stock. The court stated: "It is evident that the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty . . . (citations) . . . The Congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition as ships' stores and shall not become subject to the state taxing power. The customs regulation prescribing the exemption from state taxation, when applied to the facts of the present case, states only what is implicit in the Congressional regulation of commerce presently involved. The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce."

The instant case seems to present a situation that is clearly within the rationale of the Gulf Oil case. Sections 309, 311 and 313 of the Tariff Act of 1930, as amended, (Title 19 U.S.C.A., §§ 1309, 1311 and 1313) provide freedom from internal revenue taxes or for a drawback of taxes paid, when the required procedure is followed for domestic liquors exported, used as ships' stores, or sold to vessels employed in the

fisheries. These provisions would seem to constitute regulations of foreign commerce in the instant case just as similar provisions did in the Gulf Oil case. Certainly the purpose of this regulatory scheme is to encourage commerce and give a competitive advantage to these items. If states or their political subdivisions were allowed to impose taxes on these items an interference with this purpose would result.

Appellant seeks to distinguish the Gulf Oil case by pointing out that in that case the items sought to be taxed were manufactured from imported materials while here the liquor was of domestic origin. Its position is that that case was decided exclusively on the ground that the laying of import duties was a regulation of foreign commerce and that the exemption from import duties was similarly a regulation of foreign commerce. It maintains that since the instant case involves intoxicating liquors subject to Internal Revenue Tax levied under the taxing power that the only federal power here exercised is the taxing power. It argues that therefore there can be no exercise of the commerce power in this situation. There seems to be little merit to this contention. The Tariff Act of 1930, as amended, provides exemptions for both types of items in particular cases. There is no reason to assume that the exemption in one case would be a regulation of foreign commerce and in the other an exercise of the power to tax. This is especially true since the sections involved do not deal with the imposition of a tax, but rather with a declaration that no tax shall be imposed.

Appellant argues that the purpose of the strict governmental regulations under which the liquor is held is to prevent the diversion of the liquor to the domestic market without the payment of the Internal Revenue Tax. It seems obvious that this is one of the purposes of these regulations. However this does not necessarily mean, as appellant seems to imply, that these regulations constitute an exercise only of the taxing power to the exclusion of the commerce power. The Gulf Oil case indicates that appellant's position on this point is not well taken. The court in that case stated: "Customs regulations to insure the devotion of the imports to the intended use are likewise within the Congressional power since such regulations are not only necessary or appropriate to protect the revenue, but are means to the desired end, the regulation of foreign commerce by insuring that the particular class of exempted imports are used for the purposes for which the exemption is allowed." (309 U.S. at p. 428.)

Likewise pertinent is the language of the Supreme Court in Board of Trustees v. U. S., 289 U. S. 48, 58, that: "the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power. The purpose to regulate foreign commerce permeates the entire congressional plan." We are satisfied that it is equally true of the congressional legislation before

us that the purpose to regulate and encourage commerce "permeates the entire congressional plan."

Appellant argues that the liquor here sought to be taxed was "at rest" in San Francisco on tax day and was then part of the general mass of personal property subject to taxation. It contends that there were two shipments of this liquor: 1) an interstate shipment to San Francisco which was completed, and 2) a subsequent shipment in foreign commerce as to liquor which was exported. It argues that the storage of these goods in San Francisco constituted such a break in their transit as to remove them from the protection of the commerce clause. The cases relied on by it to support this phase of its argument deal with factual situations in which goods are immune from local taxation by reason of the fact that they are being shipped in interstate commerce. When this shipment is either ended or interrupted at the convenience of and because of the wishes of the shipper then the goods are said to have "come to rest" and are subject to local taxation. (Minnesota v. Blasius, 290 U.S. 1.) However, in the instant case the goods are not immune from local taxation because they had been traveling in interstate commerce. Rather, under the rationale of the Gulf Oil case, they derive their immunity from local taxation under the commerce clause by reason of the fact that the federal government has regulated their manufacture, transportation, storage, and exportation in furtherance of commerce, and that such taxes would constitute an interference with that regulation.

Appellant relies on Gooderham & Worts, Ltd. v. Collins, 50 Cal. App. 2d 716, and Rathjen Bros. v. Collins, 50 Cal. App. 2d 774, for the proposition that "California courts have held liquor to be ships' stores, subject to the state's taxing power." In the Gooderham case the court upheld a sales tax imposed on a distributor of distilled spirits on a sale of liquor to the Matson Navigation Company. No federal tax had been paid on this liquor. The court found that there was a delivery of the liquor free from bond to the Matson Company within the state and held that this constituted a taxable event within the meaning of the statute. The court further said "If as appellant seems to assume the liquor had been consigned for delivery at some designated point outside of the territorial limits of the United States and remained under government control until it was delivered at that point, a different situation would be presented." The instant case would seem to present a "different situation" than that discussed in the Gooderham case. Here the liquor sought to be taxed was still under federal government control when the tax was imposed. There had been no sale of it at that time.

In the Rathjen case the court upheld a sales tax imposed on the sale of distilled liquors to steamship companies. The trial court found that two of these sales had been made while the distilled spirits were in a bonded warehouse and decided that these sales were not subject to tax for this reason. The appellate court disagreed saying: "That factor has no rele-

vancy to the issue. The sale was in California and delivery was made to the purchaser in San Francisco. The respondent had no further control of the merchandise after it was delivered in San Francisco. Respondent in no sense exported these distilled spirits. These points have been fully considered and passed upon in the case of *Gooderham* . . .As there held, and for the reasons there stated, this type of sale is subject to the tax." This case does seem to go further than the Gulf Oil case in allowing local taxes to be imposed on items that have been subjected to federal control. However in both the Gooderham and the Rathjen cases the court seems to base its decision on the fact that the federal control had ceased when the state tax was imposed. In the instant case that control was still in force when the personal property tax was imposed.

Furthermore if there is anything in these California cases in conflict with the Gulf Oil case it is obvious that the Gulf Oil case must control.

Judgment affirmed.

Dooling, J.

We concur:
Nourse, P. J.
Kaufman, J.

Appendix C

ORDER DENYING HEARING AFTER JUDGMENT BY DISTRICT COURT OF APPEAL

1st District, Division 2, 1 Civ. No. 16,538

In the Supreme Court of the State of California

In Bank

National Distillers Products Corporation

vs.

The City and County of San Francisco

Appellant's petition for hearing DENIED.

Gibson,
Chief Justice.

(Endorsed)
Filed
July 18, 1956

William I. Sullivan, Clerk,
By R. J. Bell,
S. F. Deputy

FILED
NOV 1 1956
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 492

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation,
Petitioner,

vs.

NATIONAL DISTILLERS PRODUCTS CORPORATION, a corporation,
Respondent.

Brief for Respondent in Opposition

On Petition for Writ of Certiorari to the District Court of Appeal, State of California

STODDARD B. COLBY,
15 Broad Street,
New York 5, New York.

THEODORE R. MEYER,
HART H. SPIEGEL,
111 Sutter Street,
San Francisco 4, California.

Attorneys for Respondent.

BREED, ABBOTT & MORGAN
15 Broad Street,
New York 5, New York.

BROBECK, PHLEGER & HARRISON,
111 Sutter Street,
San Francisco 4, California.

Of Counsel

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 492

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, *Petitioner,*

vs.

NATIONAL DISTILLERS PRODUCTS CORPORATION, a corporation, *Respondent.*

Brief for Respondent in Opposition

On Petition for Writ of Certiorari to the District Court of Appeal, State of California

The respondent above named herewith presents its brief in opposition to the petition filed herein for writ of certiorari to review the decision and judgment of the District Court of Appeal, State of California, First Appellate District, reported in 141 Advance California Appellate Reports 719.

QUESTIONS PRESENTED

The issue in this case is whether respondent is entitled to a refund of $5,122.53, being the amount of unsecured per-

sonal property taxes assessed in respect of 9,195 cases of alcoholic liquors found by the trial court to have been in the channels of export and of foreign commerce on tax day, March 3, 1952.[1]

The trial court found *as a fact* that these liquors, produced, bottled and bonded in Maryland for export or for use as ships' stores, shipped into California for said exportation or use, and thereafter so exported or used were on that tax date in the channels of interstate and foreign commerce; that the liquors were irrevocably dedicated to such export or use by government controls designed and effective, with certainty, to insure such disposition; and that such liquors are never diverted to domestic use or sale.

The trial court held, *as a matter of law*, that as of that tax date these liquors were exempted from this local taxation by the exemption provisions and controls contained in the Tariff Act of 1930 whose recited purposes are "to provide revenue, *to regulate commerce with foreign countries, to encourage industries of the United States*, to protect American labor, and for other purposes." The court's decision was in keeping with this Court's holding in *Board of Trustees v. United States*, 289 U.S. 48 (1933), with respect to a similar predecessor tariff act:

> "The Tariff Act of 1922 is entitled—'An Act to provide revenue, *to regulate commerce with foreign countries, to encourage the industries of the United States*, and for other purposes.' The Congress *thus asserted that it was exercising* its constitutional authority '*to regulate commerce* with foreign nations.' Art. I, § 8, par. 3. * * * It is an essential attribute of the power that

1. Petitioner has not sought review of that portion of the judgment allowing a refund of $4,708.92 of tax assessed on imported liquor in its original packages. This issue is therefore excluded by the petition. Irvine v. California, 347 U.S. 128, 129 (1954).

All italics and brackets in this brief have been supplied.

> it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded *to any extent by state action.*" (289 U.S. 48, 56-57)

The California District Court of Appeal by unanimous decision affirmed the trial court; and the California Supreme Court denied a hearing, no judges voting for a hearing.

The only questions are: (a) an undisputed factual one, not forming the basis in any event for the granting of a writ of certiorari, i.e., whether on tax day, March 3, 1952, these liquors were in the channels of interstate and foreign commerce and irrevocably dedicated to exportation or use as ships' stores, and (b) whether the liquor was exempt from tax on March 3, 1952 because of action taken by the Federal Government in the exercise of its commerce power under the Tariff Act of 1930 to permit the tax-free exportation of the liquor.

Petitioner's second question is foreign to this case and somewhat misleading. Petitioner suggests that the second question is whether the grant of an exemption from tax by Congress with respect to this liquor "precludes the exercise by a state of its taxing power over such articles *from the moment of commencement of production of said articles* * * *" (Petition, p. 4). But, as the facts plainly show, all the liquor was produced and bottled in *Maryland,* shipped by common carrier under bond to *California,* and it was only while the liquor was temporarily in *San Francisco* after its shipment from Maryand that the property tax was sought to be assessed. Respondent's intimation that the lower courts held these goods were protected from taxation "from the moment of the commencement of production [in Maryland]" is a question that was never passed on by the California courts and obviously presents no basis for granting the writ.

STATEMENT OF FACTS

The Tariff Act of 1930 contains elaborate provisions permitting the manufacture and shipment of liquor in bond for exportation or use as supplies of vessels engaged in foreign trade or employed in the fisheries, free of federal duties or taxes. The trial court found (Finding VIII, Cl. Tr. 35-6) that, in accordance with the requirements of this Tariff Act and federal regulations issued thereunder, 2,706 cases of the liquor here involved had been rectified, reduced in proof and bottled in a United States customs bonded warehouse, Class 6, in Baltimore, Maryland; stamped, packaged, and labeled for export; and immediately thereafter transported by bonded common carrier to a United States customs bonded warehouse, Class 3, in San Francisco for overseas shipment. This liquor was 86 or 86.8 proof (R. Tr. 15, 30) and could be removed from the Baltimore warehouse *only for exportation* (R. Tr. 15, 30; 19 C.F.R. § 19.15). Respondent manufactured and bottled this liquor solely for export and not for domestic use (R. Tr. 13, 17; 20-26, 30; 9-10). Such liquor cannot be diverted to domestic sale or use and is never so diverted (R. Tr. 13, 26, 52; 19 C.F.R. § 19.15).

The trial court found further (Finding VIII, Cl. Tr. 35-6) that 1,208 cases of said liquor had been bottled in Baltimore, Maryland, under internal revenue bond; stamped, packaged, and labeled for export; and immediately thereafter transported by bonded common carrier to an internal revenue bonded warehouse in San Francisco for overseas shipment. The liquor was 86 proof (R. Tr. 10, 15). The labels carried the legend "Bottled in Bond for Export." They complied with the export requirements and differed from labels used domestically (R. Tr. 10, 15). The cases were marked "For Export from U.S.A." (R. Tr. 11) and contained other legends relating to exports (R. Tr. 11). A blue export strip stamp was attached over the mouth of

the bottles (R. Tr. 11) in accordance with regulations applicable to liquor bottled in bond for export (26 C.F.R. §§ 185.960, 185.977-981). The liquor moved to San Francisco by bonded carrier (R. Tr. 13, 34) immediately after bottling (R. Tr. 13). It was covered by bonds conditioned on exportation. Pursuant to the applicable law and regulations, it was checked out of the San Francisco warehouse and placed aboard a vessel for export shipment under customs supervision (R. Tr. 34), and with the use of prescribed Treasury Form 206 (26 C.F.R. § 185.773). Respondent did not divert this liquor and has never diverted liquor bottled in bond for export to domestic use (R. Tr. 13, 15). The manufacture and shipment overseas complied with federal statutes and regulations in every respect (R. Tr. 10, 41).

The trial court found further (Finding VIII, Cl. Tr. 35-6) that 5,281 cases of said liquor had been bottled, stamped, packaged, and labeled especially for export in Baltimore, Maryland; and immediately thereafter transported by bonded common carrier to the export storage room of a public warehouse in San Francisco, subject to a drawback or refund of previouly paid internal revenue taxes upon proof of export in accordance with appropriate federal regulations. These bottles were labeled "For Export," and the cases carried the legend "Bottled for Export from the U.S.A." (R. Tr. 38) The liquor moved to San Francisco by bonded common carrier (R. Tr. 13, 38) immediately after bottling (R. Tr. 13); and was in the export storage room at the South End Warehouse in San Francisco on tax day. The final movement aboard ship and to sea was under customs supervision (R. Tr. 38-39). The liquor was 86 or 86.8 proof (R. Tr. 15, 38). It was economically unfeasible to divert it to domestic use or sale (R. Tr. 15); and respondent did not so divert this liquor and has never so diverted such liquor in the past (R. Tr. 18).

The trial court also found that, pursuant to the Tariff Act of 1930 and regulations issued thereunder, all of the liquor, while in bond and under the supervision and control of appropriate federal government agencies, was placed at various times after March 3, 1952 (tax day) aboard ship for transportation to destinations in foreign countries or for use as supplies of vessels engaged in foreign trade or in the fisheries (Finding VIII, Cl. Tr. 36-7).

Finally, and significantly, the trial court found that the transportation of all said liquor to and through San Francisco and the movement aboard vessels, all under federal bond, for delivery to customers in foreign countries or for consumption on the high seas, *constituted integrated steps in a movement of goods in interstate and foreign commerce*[2] in accordance with plaintiff's plan and intent (Finding XI, Cl. Tr. 39).

REASONS FOR DENYING THE WRIT

(a) This case presents no substantial federal question nor any important point of law.

The first issue in this case is a simple issue of fact found in respondent's favor by the trial court, namely, that the liquors here involved were committed to exportation and were in the channels of interstate and foreign commerce when sought to be taxed by the City and County of San Francisco. This Court has already clearly delineated the principles which govern in this area. *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1929); *Coe v. Errol*, 116 U.S. 517

2. Petitioner states that "Some of this liquor had been in California since 1947." The word "some" refers to a part of one broken case (3/1000 of 1% of the liquor here involved)! And petitioner's reference to liquor in San Francisco from June 28, 1948 applies only to a few odd cases (less than 1% of the total). The trial court's finding is amply supported by the evidence, as the California appellate courts fully realized.

(1886); *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69 (1946); *Texas & N. O. R. R. v. Sabine Tram Co.*, 227 U.S. 111 (1913). Petitioner seeks merely to secure a review of the application of undisputed legal criteria to the facts of this case. Such a foundation for the petition presents no occasion for granting the writ.

The second question, whether certain exemption provisions contained in the Tariff Act of 1930 represent an exercise by Congress of its commerce power or an exercise solely of its taxing power, is of limited significance. To begin with, this Court has already laid down the controlling principles in such cases as *McGoldrick v. Gulf Oil Corporation*, 309 U.S. 414, 423 (1940); *Board of Trustees v. United States*, 289 U.S. 48 (1933); *J. W. Hampton, Jr. & Company v. United States*, 276 U.S. 394 (1928). The principles having been established, petitioner seeks to have this Court review the decision of the lower courts as to the application of these principles to this case.

Petitioner cites no pending litigation, no other states which have even contemplated much less attempted what the City and County of San Francisco recently sought to do, and no circumstance which lifts this case out of the general line of cases where ambitious county assessors have attempted to find a loophole in this Court's previous decisions. The California courts, acting without a single dissent at any stage of the proceedings, have provided adequate answer to the assessor in this case.

(b) This Court's prior decisions have been correctly applied: Exemption from tax may be accorded by Congress under the Commerce Power and not, as petitioner contends, solely under the Taxing Power.

Petitioner urges this Court to grant the writ in order to hold that if Congress *levies* a tax "pursuant to the taxing

power" and thereafter "provides for specific exemption under which articles shall be free from tax, both the levying of the tax and the *exemption* therefrom are an exercise of the taxing power *and of no other power.*" (Petition, p. 16) Petitioner argues that:

> "Where, *as in the case of articles of domestic manufacture,* there is no commerce involved[3] and the matter is one of exemption from internal revenue taxes levied pursuant to the taxing power of Congress, the only conclusion that can be reached is that *the granting of such exemption is an exercise of the taxing power and no other power.*" (Petition, p. 13)

Petitioner's theory that if a tax is levied under the taxing power, any exemption from the tax is *necessarily and solely* an exercise of the taxing power (although Congress may have intended the exemption as an exercise of its commerce power) is a novel proposition which this Court has already rejected. For example, the contention is completely inconsistent with this Court's decision in *McGoldrick v. Gulf Oil Corporation*, 309 U.S. 414 (1940). In that case, as this Court was careful to point out, the tax had been *imposed* by "Section 601(a), (c)(4) of the *Revenue Act* of 1932,[4] 47 Stat. 169, 260"; *exemption* from the tax for certain articles sold for use as ships' stores, etc. was provided by an *amendment to the Revenue Act of 1932*, 48 Stat. 256. This Court observed, however, that all of these revenue and *exemption provisions* were "in effect a part" of the Tariff Act of 1930;

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3. Most of petitioner's argument is based on this curious premise that in the case of domestic articles *there is no commerce involved.* The non-sequitur is apparent when it is considered that practically all our *export commerce* consists of domestic products.

4. Entitled "An Act to provide revenue, equalize taxation and for other purposes." The Congressional debates are eloquent testimony that the measure was purely a revenue bill. Cong. Rec. Vol. 75, Part 10, pp. 10529 et seq.

that the Tariff Act of 1930 clearly represented an exercise by Congress of its power to regulate foreign commerce; that "the purpose of the Congressional regulation of the commerce [i.e. exemption from the tax] would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred" by Congress; and that "The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce." Id. at 429. Thus, the exemption from tax was clearly considered an exercise of the commerce power.

Petitioner argues that duties under some tariff acts have been *imposed* under the power to regulate foreign commerce, *Board of Trustees v. United States*, 289 U.S. 48 (1933) (Petition, p. 11); but in other tariff acts this Court "was forced to rely on the constitutional power to levy taxes," to sustain the imposition, citing *J. W. Hampton, Jr. & Company v. United States*, 276 U.S. 394 (1928) (Petition, p. 12). It is very questionable whether petitioner's interpretation of the *Hampton* case is correct, but entirely apart from this flaw, petitioner's argument misses the point. We are not here dealing with inferences to be drawn from the *imposition* of a tax by Congress, we are here concerned with inferences to be drawn from an *exemption* from tax. Whether or not Congress has *imposed* the taxes on liquor under the taxing power is immaterial. The question in this case is whether Congress has *relieved* liquor manufactured in bond and committed to export or use as ships' stores from taxes by reason of its exercise of the commerce power or solely by reason of its exercise of the taxing power. We respectfully submit that the answer is to be obtained not by a consideration of cases dealing in general terms with the *imposition* of taxes or duties by the Federal Government but by examination of the specific *exemption* provisions contained in the Tariff Act of 1930.

(c) The Exemption from Tax contained in the Tariff Act of 1930 represents an exercise by Congress of its commerce power.

The courts below held that the relevant sections of the Tariff Act of 1930 and the regulations issued thereunder which chart an intricate and detailed procedure for the tax-free exportation of certain liquor *operate as an exercise of the commerce power by the Federal Government* to the end that this particular phase of commerce (which normally is subjected to heavy domestic taxation) may be exported free of the burdens of domestic taxation. The specific immunity from federal taxes contained in the Tariff Act of 1930 carries with it an inferred immunity from state taxes, just as the Supreme Court held the act did in the *Gulf Oil* case, *supra*. The purposes of the congressional regulation applicable to this phase of foreign commerce would fail if the state were free at any stage of the commerce to impose a tax which would lessen the competitive advantage conferred by Congress upon the said spirits or infringe on the congressional regulation of this class of foreign commerce.

The Tariff Act of 1930 is entitled "An Act to provide revenue, *to regulate commerce with foreign countries*, to encourage industries of the United States, to protect American labor, and for other purposes." A clearer expression of congressional purpose to regulate foreign commerce could not be written; and this Court has held that where Congress asserts, as it has in the Tariff Act of 1930, it is exercising its power to regulate commerce, that assertion will be recognized by the judiciary *and the Act will be construed as an exercise of the commerce power. Board of Trustees v. United States, supra.*

In the Tariff Act of 1930, as amended, Congress extended protection from taxation (1) to certain *imports* manufactured in bond for export or for use as ships' stores. *In the*

same Act and as part of the same sections, i.e., Sections 309, 311, and 313, Congress provided protection from taxation, (2) to certain *domestic* liquor prepared in bond for exportation or sale for use as ships' stores.

In the *Gulf Oil* case this Court concluded that the provisions incorporated in this specific Tariff Act of 1930 referred to in clause (1) above amounted to congressional regulation of the commerce and that local taxation of the goods while within the commerce regulated by the Federal Government (i.e., while within the process of export in bond) would nullify the congressional design. In the face of these facts, what possible basis is there for coming to a different conclusion with respect to the provisions of clause (2) above? *Why should one half of the congressional scheme (applied to imported goods prepared for export) be given any greater effect than the other half of the congressional scheme (applied to domestic liquor prepared for export)? As the lower courts concluded, there is every reason to give equal effect to the provisions of the Tariff Act of 1930 whether they relate to imported goods or to domestic goods, where such provisions are placed side by side in the same sections of the Act, and had as their uniform purpose protection of a segment of commerce from the burdens of heavy taxation in order that such commerce (i.e., exportation to foreign countries or use as ships' stores) might be stimulated.* This is particularly true where this Court has already held that the Tariff Act in which *both* of these provisions occurred operated as a congressional regulation of the commerce. In summary: Congress was well aware that some goods are subjected to heavy import duties and other goods are subjected to extremely burdensome domestic taxation; that in either case such taxation could effectively preclude exportation of the goods, or their sale for use as ships'

stores; and Congress, in the exercise of its power over foreign commerce, sought to insure the tax-free exportation of *both* types of commodities.

(d) Petitioner's restrictive interpretation of the powers of Congress and the purposes of the Tariff Act of 1930 and its exemptions is clearly erroneous.

Petitioner concedes that certain exemption provisions in the Tariff Act of 1930 represent an exercise of the commerce power (*Gulf Oil* case); but petitioner is forced to contend that adjacent clauses dealing with the same subject are an exercise *solely* of the taxing power. The inherent unreasonableness of this position is illustrated by the following excerpts from relevant sections of the Act, as amended. The words which, under petitioner's theory, are an exercise of the commerce power are printed in italics, the words which, according to petitioner's theory, are an exercise *solely* of the taxing power are printed in boldface type, and the words which presumably are an exercise of both powers are printed in standard type.

> "*All articles manufactured in whole or in part of imported materials,* **or of materials subject to internal-revenue tax,** and intended for exportation *without being charged with duty,* **and without having an internal-revenue stamp affixed thereto,** shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses similar to those known and designated in Treasury Regulations as bonded warehouses, class six * * *.
>
> **"Distilled spirits and wines which are rectified in bonded manufacturing warehouses, class six, and distilled spirits which are reduced in proof and bottled in such warehouses, shall be deemed to have been manufactured within the meaning of this section** * * *." Tariff Act of 1930, as amended, Sec. 311, 19 U.S.C. Sec. 1311.

"(a) *Articles of foreign* **or domestic** origin may be withdrawn, under such regulations as the Secretary of the Treasury may prescribe, *from any customs bonded warehouse, from continuous customs custody elsewhere than in a bonded warehouse, or from a foreign-trade zone free of duty* **and internal-revenue tax, or from any internal-revenue bonded warehouse, from any brewery, or from any winery premises or bonded premises for the storage of wine, free of internal-revenue tax** —(for supplies of vessels employed in the fisheries, or engaged in foreign trade, etc.)" Tariff Act of 1930, as amended, Sec. 309, 19 U.S.C. Sec. 1309.

Petitioner's theory that the courts must unravel the provisions of the Tariff Act of 1930 to separate the phrases bearing on foreign commerce in *imported* goods from the phrases bearing on foreign commerce in *domestic* goods, giving effect to the former as an exercise of the commerce power, and treating the latter as solely an exercise of the taxing power does not commend itself to reason. This is particularly true where, as the District Court of Appeal pointed out, "the purpose to regulate and encourage commerce permeates the entire congressional plan." The lower courts were certainly justified in refusing to adopt petitioner's vivisection theory in view of the clear warning of this Court expressed in *Board of Trustees v. United States, supra*, with reference to a related problem in a similar tariff act.

"* * * if the Congress * * * asserts * * * that it is exercising it [the commerce power], *the judicial department may not* attempt in its own conception of policy to distribute the duties thus fixed *by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power. The purpose to regulate for-*

eign commerce permeates the entire congressional plan." (289 U.S. at 58)

Moreover, petitioner's claim that the commerce power of Congress extends only to the exemption from local taxation of *imported articles* designed *for export* and does not extend to the exemption from local taxation of *domestic* articles designed *for export* would effectively stultify legitimate congressional action. Petitioner's restrictive interpretation would necessarily result in encouraging the importation and use of *foreign products for export in preference to domestic products,* in order to secure the tax exemption benefits of the Act. It would frustrate one of the major purposes of the Tariff Act, i.e. "to encourage industries of the United States" and encourage exportation of *domestic* goods. In short, petitioner asks this Court to deny to the Congress power to exempt domestic products destined for export from local taxation. This request, if granted, would state a principle and constitute a general precedent which would leave Congress impotent to effectuate its avowed purpose to aid and encourage the growth and development of domestic industry and the exportation of domestic goods.

(e) Petitioner's attempted distinction between imports and articles of domestic origin is spurious.

Petitioner also relies on the theory that *imports* processed in bond for exportation were exempted from tax in the *Gulf Oil* case, whereas in this case, articles of *domestic origin* processed in bond for exportation are involved. Petitioner says a distinction exists because the crude oil in the *Gulf Oil* case "retained its status as an import and as a consequence was immune *as an import* from local taxation" (Petition, p. 16).

Based on this premise that the oil in the *Gulf Oil* case "retained its status as an import," petitioner attempts to distinguish the *Gulf Oil* case on the theory that Congress would appropriately apply the *commerce power* to imports but would use only the *taxing power* in granting an exemption from tax to domestic products.

The facts in the *Gulf Oil* case are precisely the converse of what petitioner's argument assumes them to be. The "imports" in the *Gulf Oil* case *had lost their status as imports*. That was the whole point of this Court's decision. Some of the oil imported into New York had been there for a period of seven months. During this period the oil was subjected to elaborate treatment processes which *changed its character* and converted it to Bunker "C" fuel oil. Transcript of Record on Appeal to the United States Supreme Court, pp. 100-102, 116-124, and Brief for Petitioner on Writ of Certiorari, pp. 11-12, *McGoldrick v. Gulf Oil Corp., supra.*

And this Court went out of its way to point out that the exemption afforded the oil in the *Gulf Oil* case *did not arise by reason of its status as an import* but rather by reason of its status as an item *segregated in bond for export*—an item of commerce which had been singled out for protection from tax by Congress and segregated from the mass of goods in this country *by the bonding provisions* to achieve that protection. In the *Gulf Oil* case this Court specifically noted:

> "For present purposes we may assume, without deciding, that had the crude oil not been imported *in bond* it would, upon its manufacture, have become a part of the common mass of property in the state and so would have *lost its distinctive character as an import and its constitutional immunity as such* from state taxation." (309 U.S. at 423)

In other words, contrary to petitioner's assumption that the oil in the *Gulf Oil* case "retained its status as an import," this Court decided the case on the assumption that the goods had *lost* their status as imports. This Court took the oil out of the import class, stripped it of its "original package" protection, and decided the issue solely on the effect of the congressional scheme of regulation and control exemplified in the bonding provisions, as if the oil was a domestic product held in bond for export. Since the oil lost its distinctive character as an import by reason of its processing and manufacture, it was in the same category as a domestic product, and the lower courts were perfectly correct in applying the holding of the *Gulf Oil* case to the domestic liquor processed and shipped in bond for export in this case.

(f) Respondent's liquors were also exempt from this local tax under the export clause (Art. I, Sec. 10, Clause 2) of the United States Constitution, and the judgment of the courts below is amply supported by this ground.

The courts below held this liquor was exempt from tax because of action taken by the Federal Government in the exercise of its commerce power under the Tariff Act of 1930 to permit the tax-free exportation of the liquor. But as the facts plainly show, the liquor was also exempt from tax under the export clause of the United States Constitution, and this alternative ground also supports the judgment. *Carson Petroleum Co. v. Vial,* 279 U.S. 95 (1929), *Texas & N.O.R.R. v. Sabine Tram Co.,* 227 U.S. 111 (1913).

Clearly, the liquor had been "shipped, or entered with a common carrier for transportation to another state", *Coe v. Errol,* 116 U.S. 517, 527 (1886); and "there was nothing equivocal in the transaction which created even a probability that the oil [liquor in this instance] would be diverted to

domestic use." *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 83 (1946). This was not like the gasoline in *Joy Oil Company v. State Tax Commission*, 337 U.S. 286 (1949) which "might have been diverted to domestic markets" because in this case "the character of the property [i.e. liquor under bond for export] * * * made export certain for all practical purposes." (337 U.S. at 288)

This issue is largely one of fact and the findings of the trial court clearly support the judgment. *There is no occasion for this Court to grant certiorari to review a question which is largely one of fact, without general significance.*

Respondent therefore also urges this alternative contention in support of the judgment, a procedure which this Court has said is proper. *Langnes v. Green*, 282 U.S. 531, 535-539 (1931); *Walling v. General Industries Co.*, 330 U.S. 545, 547 (1947).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

STODDARD B. COLBY,
THEODORE R. MEYER,
HART H. SPIEGEL,
Attorneys for Respondent.

BREED, ABBOTT & MORGAN
BROBECK, PHLEGER & HARRISON,
Of Counsel
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